

December 12, 1989

MEMORANDUM

TO: The Honorable Duane Kanuha
Director of Planning, County of Hawaii

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Confidentiality of Complainant's Identity Under the
Uniform Information Practices Act

This is in response to your request for an advisory opinion regarding whether the identity of a complainant who reported alleged zoning violations ("complainant") may be kept confidential under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUES PRESENTED

- I. Whether the UIPA allows a government agency to keep the identity of a complainant confidential.
- II. Whether a complainant's identity can be kept confidential when the violation described in the complaint is voluntarily corrected and no further enforcement measures are necessary.
- III. Whether a complainant's identity can be kept confidential when a civil action is filed by the Corporation Counsel to remedy the zoning code violation described in the complaint.

BRIEF ANSWERS

- I. Yes. The UIPA does not require the disclosure of a complainant's identity to the general public if the disclosure would invade an individual's right to privacy or frustrate a

legitimate government function. In addition, if an express or implied promise of confidentiality was given to the complainant, an agency is not required to grant access to an individual to whom the complaint refers pursuant to section 92F-22(2), Hawaii Revised Statutes.

II. Yes. The applicable UIPA exceptions to public and individual access continue to apply even after the violation described in the complaint is voluntarily corrected and no further enforcement measures are necessary.

III. In a civil action to remedy the alleged violation, the Corporation Counsel has the discretion to assert the applicable UIPA exceptions in a motion to limit discovery or to obtain a protective order when the complainant's identity is sought in discovery.

FACTS

The Planning Department, County of Hawaii ("Department"), receives and maintains complaints about alleged zoning code violations from private citizens. After receiving a complaint, the Department's staff performs an investigation of the alleged zoning violation.

When an investigation results in the discovery of a zoning violation, the violation is sometimes voluntarily corrected by the violating party, and no further enforcement measures are necessary. When a violation is found and not corrected, the Corporation Counsel, County of Hawaii ("Corporation Counsel") may file a civil action to have the violation remedied.

The Department receives requests for the disclosure of complainants' identities. In particular, an alleged violating party often requests disclosure of the identity of the complainant who reported the alleged zoning violation. It is the policy of the Department to keep the identity of the complainant confidential.

DISCUSSION

I. Confidentiality of Complainant's Identity

The first issue raised is whether the UIPA allows a government agency to keep the identity of a complainant confidential.

A. Public Access Not Required

The UIPA, part II, sets forth a general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). Section 92F-13, Hawaii Revised Statutes, sets forth five exceptions to the general rule of open access to government records, two of which are relevant to this issue. This section provides in pertinent part:

This chapter shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

. . . .

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function; . . .
.

Haw. Rev. Stat. . 92F-13(1), (3) (Supp. 1989).

The relevant exceptions set forth in section 92F-13(1) and (3), Hawaii Revised Statutes, shall be separately addressed below.

1. Frustration of a Legitimate Government Function

By taking appropriate actions against violations, a government agency performs a legitimate government function of enforcing the laws it administers. To perform this function, an agency may rely to a large extent on the complaints of private citizens to notify the agency of possible violations.

A policy of keeping complainants' identities confidential encourages this flow of information that is necessary for agencies' enforcement of laws. Exxon Corporation v. Federal Trade Commission, 384 F. Supp. 755 (D.D.C. 1974); State v. Port Clinton Fisheries, Inc., 465 N.E.2d 865 (Ohio 1984). In Exxon Corporation, the district court described how the Federal Trade Commission's law enforcement responsibilities would be jeopardized by disclosure of the names of persons who had

written letters complaining of various practices by oil companies. The court found that "the invasion of privacy and the fear of possible reprisal" from such disclosure would deter the submission of complaints. The court, therefore, found that the relevant federal statutory exception to disclosure applied. 384 F. Supp. at 763. See also Brant Construction Co. v. United States Environmental Protection Agency, 778 F.2d 1258, 1262 (7th Cir. 1985); Pope v. United States, 599 F.2d 1383, 1387 (5th Cir. 1979). See generally J. Franklin and R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts . 1.10[4] (2d ed. 1989); J. O'Reilly, Federal Information Disclosure . 17.10 (1989).

For the same reasons, in Port Clinton Fisheries, Inc., the Ohio Supreme Court found that the anonymity of persons reporting violations of civil laws is vital to agencies' enforcement of laws. Consequently, the court held that a court order requiring disclosure of such persons' identities affects a state's substantial right and permitted an interlocutory appeal of the lower court's order to disclose.

Mandatory public access to information about complainants' identities would frustrate agencies' legitimate enforcement function because agencies would be less likely to receive incriminating information at the initiative of private citizens. The identities of complainants would, therefore, be exempt from public access under the UIPA exception contained in section 92F-13(3), Hawaii Revised Statutes, based on the frustration of a legitimate government function.

2. Clearly Unwarranted Invasion of Personal Privacy

Under the UIPA, "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1989). Thus, the UIPA exception based on personal privacy involves a balancing of interests. The UIPA's legislative history suggests that "[t]he case law under the Freedom of Information Act should be consulted for additional guidance" regarding an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

Several federal circuits have considered whether the Freedom of Information Act (FOIA) requires disclosure of the identity of an informant who had provided incriminating information for law enforcement purposes. To determine whether the privacy exception for law enforcement records under FOIA applies to an informant's identity, the federal courts balanced the privacy and public interests involved. The federal circuit courts that applied the balancing test found protectible privacy interests in the disclosure of the informant's identity. Office of Information and Privacy, U.S. Dept. of Justice, Freedom of Information Case List 443 (1988). E.g., New England Apple Council v. Donovan, 725 F.2d 139 (1st Cir. 1984); Cuccaro v. Secretary of Labor, 770 F.2d 355 (3d Cir. 1985).

As recognized by the federal courts, disclosure of an informant's identity could have a significant adverse effect on the individual's private or professional life. In contrast, the public interest in disclosure has been found to be "nothing beyond mere curiosity." New England Apple Council v. Donovan, 725 F.2d at 145.

As in FOIA case law, a complainant under the UIPA would have a significant privacy interest in the disclosure of his identity since disclosure makes the complainant an identifiable target for retribution and harassment. In the absence of a countervailing public interest, disclosure would constitute a clearly unwarranted invasion of personal privacy. Therefore, a complainant's identity would not be accessible to the public under the UIPA.

Prior Hawaii case law supports the finding that disclosure of a complainant's identity would constitute a clearly unwarranted invasion of personal privacy. The identity of a confidential informant to an agency has been held to be nondisclosable under a previous state law governing public access to personal records. Doe v. Department of the Attorney General, Civil No. 86-4304 (Haw. 1st Cir. Ct. Aug. 9, 1989). In Department of the Attorney General, the Circuit Court held that former section 92E-4, Hawaii Revised Statutes, established a legal duty of an agency to refrain from the public disclosure of personal records which would reveal the identity of a person who has provided the agency information in confidence. Id. at 11.

B. Disclosure Not Required to Individual to Whom the Record Pertains

Part III of the UIPA, sections 92F-21 to 92F-28, Hawaii Revised Statutes, governs an individual's access to government records about that individual. "All other requests for access to personal records (i.e. by others) will be handled by the preceding sections," in part II of the UIPA. S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 691 (1988). Part III of the UIPA generally requires that an individual be given access to personal records pertaining to that individual. Haw. Rev. Stat. . 92F-21 (Supp. 1989).

However, there are exemptions and limitations to an individual's access to the individual's own personal records. Haw. Rev. Stat. . 92F-22 (Supp. 1989). As one exception, an agency is not required to grant an individual access to a government record pertaining to the individual, "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." Haw. Rev. Stat. . 92F-22(2) (Supp. 1989).

This exemption requires a finding that the agency expressly promised the confidentiality of the complainant's identity or that an assurance of confidentiality may be implied. The application of this exception often hinges upon whether an implied promise of confidentiality exists. This involves assessments of whether the communication would have been made if confidentiality had not been assured and whether the agency's actions are consistent with an implicit assurance of confidentiality. Brant Construction Co. v. United States Environmental Protection Agency, 778 F.2d 1258, 1264 (7th Cir. 1985).

In Brant Construction Co., the court found an implicit assurance of confidentiality although the individual had reported illegal activity without solicitation by the agency. The court noted that a promise of confidentiality is inherently implicit when an agency solicits the information but not necessarily when the communication is unsolicited. 778 F.2d at 1263. Emphasizing the importance of both unsolicited and solicited information for law enforcement purposes, the court readily upheld the finding of an implied promise of confidentiality after reviewing the circumstances of the disclosure.

Similarly, the fact that a complainant files a complaint without agency solicitation does not rule out an implied promise of confidentiality under the UIPA. Under section 92F-22(2), Hawaii Revised Statutes, an agency is not required under the UIPA to allow an individual access to that portion of a complaint pertaining to the individual that would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

II. Confidentiality of Complainant's Identity After Correction of Violation

The second issue raised is whether a complainant's identity can be kept confidential when the violation described in the complaint is voluntarily corrected by the violating party and no further enforcement action is necessary.

A complainant may be exposed to the threat of retribution and harassment at any time that the complainant's identity is subject to mandatory public disclosure. This threat is not necessarily displaced by the subsequent results of the agency's investigation and enforcement, including voluntary correction of the violation. Citizens would be reluctant to provide incriminating information if at any time their identities as complainants were required to be disclosed. See Pope v. United States, 599 F.2d 1383, 1387 (5th Cir. 1979). As the court found in Pope, the purpose of assuring confidentiality is to encourage private citizens to provide controversial information to government agencies, and this purpose is undermined if the identities of confidential sources became publicly available immediately upon the conclusion of a formal inquiry or proceeding.

Public accessibility of a complainant's identity, even after voluntary correction of the violation, would still frustrate an agency's enforcement function and constitute a clearly unwarranted invasion of the complainant's personal privacy. Consequently, the identities of complainants would continue to be exempt from public access under section 92F-13(1) and (3), Hawaii Revised Statutes. Furthermore, if an express or implied promise of confidentiality was given to a complainant, then the complainant's identity would not be required to be disclosed to the individual to whom the

complaint pertains. Haw. Rev. Stat. . 92F-22(2) (Supp. 1989).

III. Confidentiality of Complainant's Identity During Civil Action

The third issue raised is whether a complainant's identity can be kept confidential when a civil action is filed by the Corporation Counsel to obtain an order to remedy the zoning code violation described in the complaint.

Public access under the UIPA is not required for "[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable." Haw. Rev. Stat. . 92F-13(2) (Supp. 1989). When a legal action is filed where the State or a county is a party, any other party's discovery of, or pretrial access to, government records in relation to the action is governed by the Hawaii Rules of Civil Procedure.

When another party seeks discovery of a complainant's identity, the Corporation Counsel has the discretion to assert the UIPA exceptions in a motion to limit discovery or to obtain a protective order. When a court grants the motion to limit discovery or grants a protective order, the protected information is not required to be disclosed under the UIPA since it also exempts from mandatory public disclosure "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Haw. Rev. Stat. . 92F-13(4) (Supp. 1989) (emphasis added).

However, if the court orders disclosure of the complainant's identity, the agency shall disclose this record in accordance with the court order. The UIPA requires the disclosure of "[g]overnment records requested pursuant to an order of a court." Haw. Rev. Stat. . 92F-12(b)(4) (Supp. 1989). Furthermore, the UIPA does not apply to government records that pertain to the "nonadministrative functions of the courts of this State." Haw. Rev. Stat. . 92F-3 (Supp. 1989). Therefore, if the complainant's identity is revealed in such records, the UIPA would not apply.

CONCLUSION

The UIPA does not require an agency to make the identity of a complainant publicly accessible because disclosure would frustrate the legitimate government function of law enforcement, and if the complainant is an individual, would constitute a clearly unwarranted invasion of the complainant's personal privacy. Even after the violation described in the complaint is voluntarily corrected, the agency is not required to disclose the complainant's identity under the UIPA.

If the complainant provides the information in the complaint under an express or implied promise of confidentiality, an agency is also not required to disclose the complainant's identity to the individual to whom the complaint pertains. Access by other agencies is governed by separate provisions under the UIPA. Haw. Rev. Stat. . 92F-19 (Supp. 1989).

In a civil action filed by the Corporation Counsel to enforce correction of the violation described in a complaint, the Corporation Counsel may contest disclosure of the complainant's identity on the basis of the UIPA exceptions. Disclosure is required if a court orders disclosure.

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APPROVED:

Kathleen A. Callaghan
Director